



The Journal of Appellate Practice and Process

Volume 12 | Issue 2

Article 4

2011

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Erin B. Kaheny, *Appellate Judges as Gatekeepers? An Investigation of Threshold Decisions in the Federal Courts of Appeals*, 12 J. APP. PRAC. & PROCESS 255 (2011).

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APPELLATE JUDGES AS GATEKEEPERS? AN INVESTIGATION OF THRESHOLD DECISIONS IN THE FEDERAL COURTS OF APPEALS

Erin B. Kaheny*

I. INTRODUCTION

Although litigants may take their claims to court, full merits consideration of those claims may or may not be provided. Judges, for example, might find that a litigant lacks standing to sue or that a claim was presented too early or too late for adjudication. They might conclude that the litigant failed to exhaust administrative remedies prior to seeking judicial resolution of a legal question or that the court lacks jurisdiction to decide the matter. These and other similar decisions are based on a group of threshold rules that are frequently raised in litigation which, when applied, might lead a judge to forego reaching the merits of a claim. Thus, when judges apply such threshold rules, they are aptly described as “gatekeepers.”¹

Because of the significance of threshold rules, it is unsurprising that judicial scholars have explored their use in some detail, and they have done so especially with respect to the Supreme Court.² Yet relatively few scholars have acknowledged

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1. Erin B. Kaheny, *The Nature of Circuit Court Gatekeeping Decisions*, 44 L. & Socy. Rev. 129, 130 (2010) (citing Sheldon Goldman & Thomas P. Jahnige, *The Federal Courts as a Political System* 114 (Harper & Row 1971)).

2. E.g. Burton Atkins & William Taggart, *Substantive Access Doctrines and Conflict Management in the U.S. Supreme Court: Reflections on Activism and Restraint*, in *Supreme Court Activism and Restraint* 351–83 (Stephen C. Halpern & Charles M. Lamb eds., Lexington Books 1982); Karen Orren, *Standing to Sue: Interest Group Conflict in the Federal Courts*, 70 Am. Political Sci. Rev. 723 (1976); Gregory J. Rathjen & Harold J. Spaeth, *Denial of Access and Ideological Preferences: An Analysis of the Voting Behavior*

and analyzed the threshold decisions made by the judges of the federal courts of appeals.³

But there is something very revealing about these sorts of rulings in the federal courts of appeals, which makes this situation all the more notable. After all, as Professor Cross describes,⁴ these procedural rules provide judges with discretion. This fact alone makes a study of threshold decisions in the federal courts of appeals potentially worthwhile given how their dockets are marked by their non-discretionary nature. That is, federal appellate judges' interpretations of threshold rules might lead them to forego making decisions on appellate claims even if they might otherwise have no discretion to decline to hear particular cases.⁵ In addition, while it is impossible to disagree with the argument that federal district judges play an important role as gatekeepers via the application of threshold rules,⁶ their decisions pertaining to threshold matters are obviously subject to appeal.⁷

This paper represents an effort to further explore this dimension of gatekeeping in the federal courts of appeals by providing a descriptive analysis of their threshold decisions over a substantial period of time. Employing the sample data

of the Burger Court Justices, 1969–1976, 36 W. Political Q. 71 (1983); Gregory J. Rathjen & Harold J. Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policy Making*, 23 Am. J. Political Sci. 360 (1979) [hereinafter Rathjen & Spaeth, *Access to the Federal Courts*]; Mark Silverstein & Benjamin Ginsberg, *The Supreme Court and the New Politics of Judicial Power*, 102 Political Sci. Q. 371 (1987); William A. Taggart & Matthew R. DeZee, *A Note on Substantive Access Doctrines in the U.S. Supreme Court: A Comparative Analysis of the Warren and Burger Courts*, 38 W. Political Q. 84 (1985); Stephen L. Wasby, *The Supreme Court in the Federal Judicial System* 121–244 (2d ed., Holt, Rinehart & Winston 1984); Stephen L. Wasby, *Continuity and Change: From the Warren Court to the Burger Court* 31–54 (Goodyear Publg. Co. 1976).

3. See e.g. Frank Cross, *Decision Making in the U.S. Courts of Appeals* 178–200 (Stanford U. Press 2007); Kaheny, *supra* n. 1; Erin B. Kaheny & Kimberly J. Rice, *Threshold Rules as Tools of Deference?: Circuit Judge Gatekeeping in Administrative Agency Cases*, 31 Just. Sys. J. 201 (2010); Richard J. Pierce, Jr., *Is Standing Law or Politics?* 77 N.C. L. Rev. 1741 (1999).

4. Cross, *supra* n. 3, at 180–81.

5. Kaheny, *supra* n. 1, at 131.

6. Goldman & Jahnige, *supra* n. 1, at 114; see also C.K. Rowland & Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. Pol. 175, 177 (1991) (stating that “[m]ost gatekeeping decisions are made by trial judges”).

7. Kaheny, *supra* n. 1, at 131; Kaheny & Rice *supra* n. 3, at 205.

available in the United States Courts of Appeals Database,⁸ I investigate the frequency with which the federal courts of appeals consider cases raising threshold issues and examine whether the circuits seem to vary in their threshold behavior. Moreover, comparisons are drawn between Democratic and Republican appointees to the federal appellate bench and among “presidential appointment cohorts”⁹ to determine whether presidents have selected federal appeals court judges whose voting behavior varies systematically on questions of judicial access and, if so, whether such tendencies are more pronounced in certain types of litigant contests and/or with respect to certain types of threshold issues.

II. BACKGROUND

Judicial scholars have recognized the importance of threshold rules, given the implications such rules have on litigant access to the judiciary.¹⁰ Review of the relevant literature suggests emphasis on the Supreme Court’s procedural gatekeeping—investigating both the frequency with which the Court considers threshold questions and whether such decisions serve to restrict or enhance access.¹¹ The resulting analyses are suggestive of at least some differences in the consideration and treatment of these issues across select Supreme Court regimes (i.e., Warren versus Burger Court eras)¹² and also point to multiple sources of influence in the gatekeeping behavior of individual justices.¹³ In addition, among the insights generated by this line of research is the basic notion that a justice’s

8. See Donald R. Songer, *The United States Courts of Appeals Database* (NSF# SES-89-12678). This database, which covers 1925–96, can be downloaded from the Judicial Research Initiative (JuRI) site at the University of South Carolina, <http://www.cas.sc.edu/poli/juri/> (click “Databases,” then click “United States Courts of Appeals Databases”) (accessed Sept. 13, 2011; copy of main page on file with Journal of Appellate Practice and Process) [hereinafter “Original Courts of Appeals Database”].

9. See Rowland & Todd, *supra* n. 6, at 178.

10. Taggart & DeZee, *supra* n. 2, at 84.

11. See e.g. Atkins & Taggart, *supra* n. 2; Taggart & DeZee, *supra* n. 2.

12. See Taggart & DeZee, *supra* n. 2. But see Atkins & Taggart, *supra* n. 2, at 378 (arguing that “aggregate data do not suggest any dramatic departure in the pattern of access decisions after 1969”).

13. Rathjen & Spaeth, *Access to the Federal Courts*, *supra* n. 2, at 374–81.

preferences pertaining to the merits of a case can influence how the justice construes threshold rules.¹⁴

Of course, another important area of research involves an exploration of gatekeeping practices at the first rung of the judicial ladder—the federal district courts. Of particular note in this respect is a study that found support for the proposition that district judge decisions to grant standing might have their roots in the policy preferences of those who appointed the judges to the federal bench.¹⁵ Certainly, this analysis of Reagan appointees to the federal district court bench was suggestive of the point, with such judges being more inclined to limit standing in cases in which underdog litigants were challenging upperdogs.¹⁶ More flexible standing decisions for underdogs were provided, unsurprisingly, by Carter appointees but, as the authors note, such decisions were contingent upon the nature of the claims pursued.¹⁷

Surprisingly, little systematic research has focused on the threshold decisions of courts of appeals judges. That which has been conducted, however, does suggest the significance of these decisions in this venue as well. Indeed, Professor Cross has noted that threshold issues appear with some frequency in the courts of appeals.¹⁸ In addition, he reported modest support for the proposition that such decisions, even at this level, are related to judicial ideology.¹⁹ This latter finding certainly supports the findings of an earlier study by Professor Pierce involving a more limited sample of standing decisions in environmental cases before the federal courts of appeals, which described notable differences in the gatekeeping behavior of judges appointed by Republican and Democratic presidents, with the former more likely to restrict standing.²⁰ Moreover, recent work modeling the likelihood of a federal appellate judge granting a pro-access vote

14. *See generally id.*

15. Rowland & Todd, *supra* n. 6.

16. *Id.* at 181.

17. *Id.* at 183.

18. Cross, *supra* n. 3 at 187 (citing the presence of such issues in the sample of cases comprising the Original Courts of Appeals Database); *see also* Kaheny, *supra* n. 1, at 131.

19. Cross, *supra* n. 3, at 191.

20. Pierce, *supra* n. 3, at 1744.

also suggests “that both ideological considerations and litigant status may play a role in” these decisions.²¹

While a few scholars have recognized that federal appellate judges render their fair share of threshold decisions and, while there is some evidence that such decisions have a partisan or ideological nature, a basic study of the extent of this role is noticeably lacking in the literature. Few scholars, for example, have sought to investigate whether the circuits vary in the extent to which they consider threshold questions and in terms of their overall access behavior. These trends alone, however, might yield substantively important patterns. Similarly, extension of the work already conducted in the federal district courts²² to the appellate context might also yield valuable information regarding the political nature of threshold decisions in the federal courts of appeals and, specifically, the ability of presidents to achieve policy goals pertaining to judicial access via their appointments to the federal courts of appeals. The purpose of the present study is to address these descriptive voids.

III. DATA AND METHODS

For the purposes of analyzing the extent and partisan nature of threshold decisions in the federal courts of appeals, I turn to the Original Courts of Appeals Database, which includes a sample of published opinions.²³ Cases raising a jurisdictional challenge or questions pertaining to the statement of a proper claim, standing, exhaustion, statutes of limitations, and the payment of fees are identified in the sample. In addition, cases involving determinations as to whether a party is immune from suit or whether a claim is ripe or moot, involves a possible political question, is frivolous, or raises a miscellaneous threshold concern are denoted in the dataset, which also

21. Kaheny & Rice, *supra* n. 3, at 201, 220; *see also* Kaheny, *supra* n. 1, at 150.

22. *See* Rowland & Todd, *supra* n. 6.

23. The Database entails fifteen opinions for each circuit-year through 1960 and thirty opinions for each circuit-year thereafter. *See* Original Courts of Appeals Database, *supra* n. 8. The reader should note that the Original Courts of Appeals Database was also used by Professor Cross. *See generally* Cross, *supra* n. 3.

indicates the pro- or anti-access directionality of the associated decision pertaining to the threshold question.²⁴

Utilizing this source of data, I first compute the percentage of cases in each circuit that raise threshold issues and then proceed to compute the percentage of pro-access decisions by circuit. For the purposes of this study, I define all threshold votes in which the court (or a judge) finds that a threshold bar does not restrict consideration of the merits of an appeal to be a pro-access decision. Similarly, if the court (or judge) finds that a threshold issue should not have barred the district court's consideration of the merits, the decision (or judge's vote) is coded as a pro-access decision. For example, a finding that an appeal was not frivolous would be coded as a pro-access vote, as would a finding that a standing or ripeness barrier should not have curtailed a district court decision on the merits.

The analyses of the frequency of threshold decisions on each circuit's docket and the percentage of pro-access decisions in each circuit (in terms of majority outcomes) are conducted across five time periods delineating various Supreme Court eras and across all threshold issues coded in the Original Courts of Appeals Database. For this purpose, the first time period (1954 to 1961) corresponds to the early Warren Court era, while the second period (1962 to 1968) includes the later Warren Court years. The third (1969 to 1971) and fourth (1972 to 1985) time periods split the Burger Court, and the final period of the study, covering the early Rehnquist Court, includes the years 1986 to 1996,²⁵ the end date being the last year of data available in the Original Courts of Appeals Database.

Subsequent analyses move beyond an investigation of case-level outcomes on threshold questions to an investigation of individual judge threshold votes, with specific attention to partisan-based sources of influence on those votes. Specifically, comparisons are made in the gatekeeping behavior of judges appointed by Republican and Democratic presidents. Moreover,

24. Original Courts of Appeals Database, *Documentation for Phase 1*, at 118–25, http://www.cas.sc.edu/poli/juri/cta96_codebook.pdf (accessed Sept. 13, 2011; copy on file with Journal of Appellate Practice and Process) [hereinafter “Original Courts of Appeals Database Documentation”].

25. These results are confined to approximately the first half of the Rehnquist Court. The trends noted in this discussion or elsewhere in this article may not be characteristic of the Rehnquist Court's later period.

based on previous research in the federal district courts,²⁶ the likelihood of a judge voting to grant access (i.e., to issue a pro-access threshold decision) is modeled as a function of the judge's appointing president in order to determine if larger differences among judicial appointees are apparent in the courts of appeals as well.²⁷

Individual judge votes with respect to threshold decisions were drawn from the Original Courts of Appeals Database and, for this analysis, were limited to those rendered in regular three-judge panels. Because the convention of the database is to code the majority (not individual judge) ruling for the threshold questions coded in the sample, additional review had to be undertaken for any case including a dissent. Based on this review, I coded the dissenting judge's vote on the threshold question to be opposite to that of the majority when the judge clearly took issue with the majority's decision on the threshold issue or when this interpretation could be fairly implied.

Based on a review of an earlier analysis of Supreme Court procedural decisions, I opted to analyze, when possible, the "proper party" and "proper forum" threshold decisions of various appointment and partisan cohorts included in the appeals court sample.²⁸ Unlike the authors of that earlier analysis, however, I consider potential jurisdictional bars as "proper forum" issues. Specifically, threshold challenges relating to jurisdiction are combined with those concerning exhaustion, immunity, and the doctrine of political questions for analyses of "proper forum" votes. Threshold challenges as to whether a

26. See Rowland & Todd, *supra* n. 6.

27. Information about appointing presidents was obtained via Gary Zuk, Deborah J. Barrow, & Gerard S. Gryski, *The Multi-User Database on the Attributes of United States Appeals Court Judges (1801-2000)* (NSF# SBR-93-11999), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/6796/detail> (accessed Sept. 13, 2011; copy of main page on file with Journal of Appellate Practice and Process), and Federal Judicial Center, *History of the Federal Judiciary—Biographical Directory of Federal Judges*, <http://www.fjc.gov/history/home.nsf/page/judges.html> (accessed Sept. 13, 2011; copy of main page on file with Journal of Appellate Practice and Process).

28. See Taggart & DeZee, *supra* n. 2, at 85. In their analysis, Taggart and DeZee utilized these two subcategories along with a category devoted to jurisdictional issues. While exact matching was not possible, I include those threshold issues coded in the Original Courts of Appeals Database as either a "proper party" or "proper forum" issue pursuant to the definitions of these categories provided by Taggart and DeZee. See *id.*

given claim is ripe for adjudication²⁹ or is moot, along with those probing whether a litigant has standing to sue, or has stated a proper claim, and challenges coded under the subcategory of “timely” in the Original Courts of Appeals Database³⁰ are designated as “proper party” cases.³¹

Given that earlier work on district judges’ decisions about standing indicates that behavioral characteristics of presidential appointment cohorts might hinge on the kinds of parties challenging one another,³² I apply the framework utilized in that study in my analysis of appellate judge threshold behavior. Specifically, I assess cohort or “appointment effects”³³ separately for “upperdog”-versus-“upperdog” cases (i.e., upperdog confronts the threshold challenge) and for “underdog”-versus-“upperdog” cases (i.e., underdog confronts the threshold challenge).³⁴ Unlike the earlier study, which was limited to votes on standing,³⁵ examination of a variety of procedural threshold decisions in the courts of appeals also permits an analysis of cohorts in situations in which upperdogs confront underdogs and face a procedural challenge.³⁶

Because researchers usually assume that the upper hand belongs to the government or businesses when they sue typical individuals,³⁷ I consider the former as upperdog parties and the latter as underdogs. Groups and those coded under the “miscellaneous” and “not ascertained” party-type categories in the Original Courts of Appeals Database³⁸ are omitted.³⁹

29. Ripeness challenges are not differentiated from exhaustion challenges in the Original Courts of Appeals Database, see Original Courts of Appeals Database Documentation, *supra* n. 23, at 120, and, thus, ripeness challenges were identified by the author after review of these cases.

30. *Id.* at 121.

31. Taggart & DeZee, *supra* n. 2, at 85.

32. Rowland & Todd, *supra* n. 6, at 180.

33. *Id.* at 179.

34. *Id.* at 178–79.

35. *Id.* at 177.

36. As in the Rowland and Todd study, see *id.* at 179, there were not enough votes in my sample to model underdog v. underdog challenges.

37. Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs on the United States Courts of Appeals*, 36 Am. J. Political Sci. 235, 239 (1992) (citing Stanton Wheeler et al., *Do the ‘Haves’ Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 L. & Socy. Rev. 403 (1987)).

38. Original Courts of Appeals Database Documentation, *supra* n. 24, at 40.

IV. RESULTS

A. Consideration of Threshold Issues

As noted above, few have studied the amount of attention given by federal appellate judges to threshold rules in the appeals that reach their courts.⁴⁰ Professor Cross, however, provided some descriptive information when reporting that about ten percent of the Original Courts of Appeals Database sample entails threshold inquiries.⁴¹ Moreover, his examination of figures for each sample-year led him to conclude that “the frequency of threshold issues in general has not varied much over time.”⁴² My own earlier work also included some descriptive information across various Supreme Court regimes to highlight the presence of these issues on the dockets of the federal courts of appeals.⁴³

While this information is certainly useful, we are still left with key questions on the descriptive front. First, are some circuits more likely than others to consider threshold questions? And, secondly, is there any other form of variation in the consideration of threshold issues across the circuits that can be discerned? Given the likely interest with respect to both questions, Table 1, which appears on the following page, presents the percentages of sample cases in the Original Courts

39. See Songer & Sheehan, *supra* n. 37, at 238 (justifying such an omission). Rowland and Todd coded “corporate or governmental litigants” as “upperdog litigants” and “unions, unincorporated individuals, or groups representing such individuals” as “underdogs.” See Rowland & Todd, *supra* n. 6, at 178–79 (noting that the authors’ analysis employed the coding scheme suggested by S. Sidney Ulmer, *Selecting Cases for Supreme Court Review: An Underdog Model*, 72 Am. Political Sci. Rev. 902 (1978)). While my operationalization of upperdogs is similar, unlike these authors, I include only individuals as underdogs. Further, as in my previous studies, see Kaheny, *supra* n. 1, at 145; Kaheny & Rice, *supra* n. 3, at 206, I designated these threshold contests with reference to the Original Courts of Appeals Database’s coding of the threshold issue, the appellant and appellee, and the “initiate” of the appeal. See Original Courts of Appeals Database Documentation, *supra* n. 24, at 118, 40, 33. Further, I followed steps mentioned in these studies to exclude cases where this coding would not provide for proper characterization. As in my earlier study, Kaheny, *supra* n. 1, at 148 n. 19, I do not consider “criminal” and “prisoner petitioner cases” here.

40. Cross, *supra* n. 3, at 186.

41. *Id.* at 187.

42. *Id.*

43. Kaheny, *supra* n. 1, at 131; see also Kaheny & Rice, *supra* n. 3, at 214–15.

of Appeals Database raising at least one threshold issue across the five time periods designed to correspond to key Supreme Court eras.⁴⁴

TABLE 1					
PERCENTAGE OF SAMPLE CASES RAISING A THRESHOLD ISSUE PER CIRCUIT-PERIOD					
Circuit	1954-61 (Time 1)	1962-68 (Time 2)	1969-71 (Time 3)	1972-85 (Time 4)	1986-96 (Time 5)
D.C.	16.30	16.19	11.11	24.29	34.55
1st	29.63	18.57	12.22	20.95	29.09
2d	20.74	17.14	16.67	21.90	30.61
3d	17.78	27.62	17.78	29.29	34.85
4th	20.00	15.64	5.62	22.14	28.18
5th	22.22	17.62	10.00	23.04	24.24
6th	17.78	15.71	14.44	17.86	23.03
7th	20.00	19.05	23.33	26.90	27.88
8th	12.59	20.95	17.78	18.57	19.39
9th	16.30	21.43	11.11	24.52	29.70
10th	22.22	20.48	8.89	21.67	24.24
11th	—	—	—	27.73	26.06
(n) for each circuit	135	210*	90**	420***	330
Mean	19.60	19.13	13.55	22.95	27.65
*The total number of sample cases for the Fourth Circuit in the second time period is 211.					
**The total number of cases for the Fourth Circuit in the third time period is 89.					
***The total number of cases for the Fifth Circuit in the fourth time period is 421, and for the Eleventh Circuit 119.					

As seen in Table 1, the dockets of the various courts include their fair share of cases with threshold inquiries. When

44. Data from the Eleventh Circuit are available only for the last two time periods of the study, because it was established in 1981. Thus, for the Eleventh Circuit, the fourth time period includes only the years 1981-85.

aggregating the data in this manner, it was not uncommon to discover that these issues were raised in over twenty percent of the cases in a particular circuit. Moreover, the general trend reveals that procedural issues are being raised or considered in a larger percentage of cases across the periods, with the exception of the third time period, which marks the early Burger Court.⁴⁵

More specifically, the mean percentage for the first two time periods hovered around nineteen percent, but increased to nearly twenty-eight percent by the fifth period of the study, with a marked increase occurring during the era of the late Burger Court. The increase continued in the early Rehnquist Court, with threshold issues being raised in at least twenty percent of the sample cases in all but one circuit between 1986 and 1996.

Further, there is notable variation in the extent to which such issues are raised across the circuits and, in the context of a given court, across these five time periods. As seen in Table 1, most circuits have experienced some significant fluctuation, at least at some point, in the number of cases involving threshold issues on their dockets. There is also significant variation in these trends within each time period. For instance, in the first period of the study (1954–61), nearly thirty percent of the First Circuit's docket raised a threshold issue, while such cases were not nearly as prevalent on the docket of the Eighth Circuit. Similarly, in the second period, there was over a ten-point difference in the percentage of cases raising threshold issues between the Third Circuit (27.62) and the D.C. (16.19), Fourth (15.64), and Sixth Circuits (15.71). Similar differences among the various circuits are seen in the third and fourth periods and, to some extent, the fifth time period as well.

B. Trends in Granting Access

As seen in the previous section, procedural issues of access

45. It is important, of course, to consider that examination across these time periods produces distinct results from one conducted across each year. See Cross, *supra* n. 3, at 187. However, differences in the figures reported here as compared to those reported in Professor Cross's work may also potentially relate to the threshold issues examined. Professor Cross, for example, lists six threshold variables included in the Original Courts of Appeals Database. *Id.* at 186–87. I include all thirteen designations of threshold issues indicated there. See Original Courts of Appeals Database Documentation, *supra* n. 24, at 118–25.

are frequently raised on appeal. The extent to which such issues are considered in appellate decisions, moreover, varies across circuits and time. Of potentially more importance, however, is how circuit judges either apply or interpret the relevant rules.

TABLE 2					
PERCENTAGE OF PRO-ACCESS DECISIONS PER CIRCUIT-PERIOD					
Circuit	1954-61 (Time 1)	1962-68 (Time 2)	1969-71 (Time 3)	1972-85 (Time 4)	1986-96 (Time 5)
D.C.	33.33 (18)*	36.36 (33)	70.00 (10)	49.48 (97)	39.25 (107)
1st	42.11 (38)	50.00 (38)	50.00 (10)	43.90 (82)	34.83 (89)
2d	34.62 (26)	40.00 (35)	40.00 (15)	51.72 (87)	40.40 (99)
3d	47.62 (21)	51.72 (58)	37.50 (16)	57.26 (117)	40.19 (107)
4th	37.04 (27)	36.67 (30)	0.00 (5)	39.08 (87)	32.50 (80)
5th	44.83 (29)	58.33 (36)	11.11 (9)	43.82 (89)	46.58 (73)
6th	17.39 (23)	30.30 (33)	53.85 (13)	47.76 (67)	40.85 (71)
7th	48.00 (25)	25.00 (40)	31.58 (19)	50.93 (108)	34.48 (87)
8th	43.75 (16)	27.27 (44)	18.75 (16)	40.85 (71)	35.48 (62)
9th	38.10 (21)	27.91 (43)	30.00 (10)	45.83 (96)	46.81 (94)
10th	53.57 (28)	27.50 (40)	50.00 (8)	62.50 (88)	47.22 (72)
11th	—	—	—	46.67 (30)	49.38 (81)
Mean	40.44 (272)	37.67 (430)	36.64 (131)	48.87 (1019)	40.61 (1022)
*The number of cases involving at least one clearly decided threshold question appears in parentheses.					

As a point of departure in investigating these differences in access behavior, Table 2, above, shows the percentages of "pro-access" cases in each circuit-period, which are defined as cases in which the outcomes support a party's right to have the merits of his or her claim addressed in the district court or on appeal.⁴⁶

Interestingly, Table 2 reveals significant differences among the circuits in their tendencies to grant access (i.e., to issue pro-access majority decisions) in the face of a threshold challenge. For example, when comparing the circuit-period pro-access percentages to the overall mean percentage for each time period, one can see that the Fourth Circuit's pro-access percentages are generally lower than that of the overall mean for each time period, although the circuit's reported percentage for the second period is very close to the overall mean. Similarly, a general tendency to close access might be seen in the Eighth Circuit, which, with the exception of the first time period, registered pro-access percentages lower than that of the overall mean. On the flipside, parties wishing to have the merits of their cases addressed by a court fared better in the Third and Tenth Circuits. Indeed, the Third Circuit's pro-access percentages were higher than the overall mean for the first four time periods and about equal to the mean in the last time period. The Tenth Circuit, moreover, had higher pro-access percentages than the overall mean for all but the second time period.

This variation is also seen when comparing the circuits within each time period. In the first time period, for instance, threshold issues were raised in a similar number of cases in the Sixth and Seventh Circuit samples; however, the Seventh Circuit appeared more likely to grant access, issuing pro-access decisions in forty-eight percent of the decisions in contrast to the Sixth Circuit's reported seventeen percent. In the second period, moreover, the Fifth Circuit considered threshold issues in thirty-six sample cases and granted access in fifty-eight percent of them, a figure well above the mean for the overall time period (37.67 percent). On the other hand, the Seventh and the Tenth Circuits each considered a number of cases raising threshold

46. Outcomes were coded in accordance with Kaheny, *supra* n. 1, at 141, for those decisions implicating more than one threshold doctrine.

issues comparable to that in the Fifth Circuit, but granted access at the rate of twenty-five and twenty-eight percent, respectively.

In addition, although the third time period of the study encompasses only three years and, thus, contains fewer cases, there is still some variation across the circuits. The Fifth Circuit, which produced more than the average number of pro-access decisions in the second period, granted access in only eleven percent of its threshold decisions in the third time period, as opposed to the First and Tenth Circuits, which granted access in half of their threshold decisions, or the D.C. Circuit, which granted access in seventy percent of its threshold cases in the sample.

Finally, while the total number of cases raising at least one threshold challenge increases with the longer time periods of the late Burger Court and the early Rehnquist Court, variation in access behavior persists. For instance, the Eighth Circuit, whose pro-access percentages were below the mean percentage in the second and third periods, continues this pattern in the fourth and fifth time periods as well, granting access in about forty-one percent and thirty-five percent of its threshold cases, respectively. The Third Circuit, conversely, registered pro-access percentages above the mean for the second and third periods and continued this tendency in the remaining periods as well, granting access in fifty-seven percent of its threshold decisions in the late Burger Court era and about forty percent in the early Rehnquist period, a figure close to the overall mean. In addition, although the First Circuit's sample for the final period contained only five fewer cases in which a threshold issue was clearly decided than that of the Ninth Circuit, the Ninth Circuit granted access more frequently than the First Circuit.

C. Partisan Differences in Gatekeeping Behavior

It is apparent from this analysis that the percentage of cases involving threshold challenges varies considerably from circuit to circuit, as do percentages of pro-access rulings. Though an exhaustive account of the sources of such variation is beyond the scope of this article, one possible source involves judicial policy

preferences.⁴⁷ Thus, we might ask whether there are any basic partisan differences among federal appellate judges with respect to threshold rulings beyond the area assessed by Professor Pierce. In the spirit of the Rowland and Todd analysis, one should also inquire as to whether such differences are more or less manifest when the cases involve “disadvantaged” parties.⁴⁸

TABLE 3			
PERCENTAGE OF PRO-ACCESS VOTES BY POLITICAL PARTY OF THE APPOINTING PRESIDENT			
President's Party	Upperdog v. Upperdog	Upperdog v. Underdog	Underdog v. Upperdog
ALL THRESHOLD VOTES			
Democrat	49.45% (730)*	55.43% (92)	41.87% (886)
Republican	45.63% (892)	49.18% (122)	35.07% (1018)
Difference**	p=0.0626	p=0.1825	p=0.0012
PROPER-PARTY VOTES			
Democrat	45.20 % (281)	45.71% (35)	44.81% (424)
Republican	40.30 % (330)	46.34% (41)	35.28% (530)
Difference	p=0.1111	p=0.5219	p=0.0014
PROPER-FORUM VOTES			
Democrat	57.70% (305)	72.34% (47)	43.48% (368)
Republican	56.23% (329)	66.13% (62)	46.39% (429)
Difference	p=0.3544	p=0.2441	p=0.7948
*In each column, number in parentheses = number of votes in which at least one threshold question in the pertinent category was clearly decided.			
**In each category, difference = difference in proportions test (one-tailed).			

47. See Pierce, *supra* n. 3, at 1760 (reporting party-based differences in a select area of standing cases—involving environmental law—decided on appeal).

48. See Rowland & Todd, *supra* n. 6, at 184.

To get at these questions, I present in Table 3, above, the percentage of pro-access votes cast by judges appointed by Republican and Democratic presidents. Specifically, these votes are reported across all threshold issues as well as across proper-party and proper-forum votes for three types of cases in the years from 1957 to 1996.

In the context of all threshold votes combined, Table 3 indicates that both Democratic- and Republican-appointed judges cast pro-access threshold votes less than fifty percent of the time when upperdogs were squaring off against upperdogs, though Democratic appointees nearly reached the fifty-percent mark. Interestingly, the data did not show Republican appointees to be more flexible in their threshold behavior for upperdog litigants confronting underdog litigants. Democratic appointees, however, did register a larger pro-access percentage than Republican appointees when underdog litigants confronted a threshold challenge in cases against upperdogs. A one-tailed difference-of-proportions test supports the hypothesis that federal appellate judges appointed by Democrats cast a higher proportion of pro-access votes in this context than those appointed by Republicans.⁴⁹

As also seen in Table 3, when limiting the analysis to proper-party votes, judges appointed by Democratic presidents cast more pro-access votes than Republican appointees when upperdogs faced a threshold question in their cases against fellow upperdogs, but this difference was significant only at the 0.1 level.⁵⁰ There was no significant difference between these groups' pro-access percentages in cases in which an upperdog faced a potential proper-party threshold bar in an action against an underdog. As reported in Table 3, both groups registered about a forty-six percent pro-access-vote rate in these types of cases.⁵¹ Once again, the most striking difference is that between Democrat and Republican appointees when underdog litigants faced threshold challenges in cases against upperdogs: Judges

49. See the third column of the "Difference" row in the "All Threshold Votes" section of Table 3, *supra*, which indicates that $p=.0012$.

50. See the first column of the "Difference" Row in the "Proper-Party Votes" section of Table 3, *supra*.

51. See the second column of the "Democrat" and "Republican" rows in the "Proper-Party Votes" section of Table 3, *supra*.

appointed by Democrats cast pro-access votes almost forty-five percent of the time in cases involving proper-party questions, whereas judges appointed by Republican presidents cast pro-access votes about thirty-five percent of the time in cases involving proper-party questions.⁵² A one-tailed difference-of-proportions test further supports the notion that Democratic appointees cast a higher proportion of pro-access votes than Republican appointees when underdogs sue upperdogs and confront a proper-party question.⁵³

Partisan differences are far less pronounced in the sample of proper-forum votes. In this area, for example, there was a less than two-percentage-point difference in the sample percentage of pro-access votes cast by the two groups of judges in upperdog-versus-upperdog cases.⁵⁴ Moreover, there was not a particularly strong difference in the voting behavior between Democratic and Republican appointees when upperdogs sued underdogs and met a proper-forum challenge.⁵⁵ Further, whereas the votes of Democratic appointees produced a significantly higher pro-access percentage in deciding proper-party questions on behalf of underdog litigants in their contests against upperdogs, in the context of proper-forum questions, the pro-access percentages of the two cohorts of judges were separated by only about three percentage points.⁵⁶

D. Presidential Appointment and Gatekeeping Behavior.

The results in Table 3 thus suggest the existence of some partisan differences with respect to gatekeeping behavior by federal appellate judges, and further suggest that they are most likely a function of differences in judges' treatment of proper-party questions. A natural question to ask, therefore, is whether

52. See the third column of the "Democrat" and "Republican" rows in the "Proper-Party Votes" section of Table 3, *supra*, which shows that the number of votes measured for Democratic appointees was 424 and that for Republican appointees 530.

53. The relevant value here was $p=0.0014$.

54. See the first column of the "Democrat" and "Republican" rows in the "Proper-Forum Votes" section of Table 3, *supra*.

55. See the second column of the "Democrat" and "Republican" rows in the "Proper-Forum Votes" section of Table 3, *supra*.

56. See the third column of the "Democrat" and "Republican" rows in the "Proper Forum Votes" section of Table 3, *supra*.

such findings are a function of particular appointment cohorts. On this point, an earlier analysis of federal district judges is most helpful, as this investigation of standing decisions produced some interesting, albeit conditional, findings among the cohorts examined there.⁵⁷

In that study, federal district judges selected by Nixon/Ford (i.e., appointed and confirmed while Nixon was president as well as those confirmed after he left office⁵⁸), Carter, and Reagan were, at first glance, quite comparable to one another in their propensity to acknowledge standing.⁵⁹ Although the authors had hypothesized that “Reagan’s appointees . . . should be much more resistant to disputed standing claims than their brethren appointed by President Carter and somewhat more resistant than their brethren appointed by President Nixon,”⁶⁰ such judges, in fact, did not behave in this manner when upperdogs confronted a potential standing bar.⁶¹ Underdogs, though, did experience more difficulty among these judges.⁶² They had better luck among Carter judges—at least if their litigation objectives involved “social regulation” as opposed to “personal remuneration.”⁶³ Interestingly, the type of litigant claims or claimants did not seem to influence the behavior of Nixon/Ford judges, as “this presidential cohort’s most notable characteristic is its consistency across claimant and dispute categories.”⁶⁴

While this earlier analysis focused on standing decisions in federal district courts,⁶⁵ one might expect significant differences across presidential cohorts in threshold decisions more generally in the federal courts of appeals. To get at this possibility, I developed a series of logistic regression models of the likelihood of a pro-access vote.⁶⁶ The models are tested

57. See Rowland & Todd, *supra* n. 6, at 180–83.

58. *Id.* at 177 n. 1.

59. *Id.* at 180.

60. *Id.* at 178.

61. *Id.* at 180–81.

62. *Id.*

63. *Id.* at 183.

64. *Id.* at 184.

65. See generally *id.*

66. Specifically, the dependent variable in these models is the individual judge’s decision with respect to the threshold challenge raised in the case. It is coded “1” and

across all threshold votes as well as separately for proper-party votes and proper-forum votes cast by select presidential cohorts in the Original Courts of Appeals Database, which includes sample data through 1996. Moreover, because previous research⁶⁷ indicates that threshold behavior might be contingent upon the nature of the cases at issue, I again explore such differences among scenarios suggested by that research, including upperdog-versus-upperdog cases and those in which underdogs face a threshold bar when challenging upperdogs.⁶⁸ Due to the small number of votes cast by the Ford and Clinton presidential cohorts in the sample, the analysis of the votes cast in all threshold decisions is confined to the voting behavior of the Nixon, Carter, Reagan and Bush I cohorts, with the Carter cohort as the excluded category. When further divided into the proper-forum and proper-party votes, moreover, the Bush I cohort cast too few votes to be included. Thus, the judges analyzed in the proper-forum and proper-party models include those appointed by Nixon, Carter, and Reagan, with the Carter judges selected as the excluded category.

Based on the earlier analysis conducted in the federal district courts,⁶⁹ I do not expect the Reagan cohort in the federal courts of appeals to be generally less supportive of access than the other judicial cohorts under all situations. Rather, I hypothesize that this will occur when underdog litigants face threshold challenges in cases against upperdogs. In particular, if the previous findings⁷⁰ with respect to the Reagan cohort's treatment of underdogs can be generalized to the federal

deemed a pro-access vote if the judge finds that a threshold challenge should not limit consideration of the merits in either the district court or, if applicable, the court of appeals, and is coded "0" if the vote limits a full hearing on the merits (again, at either level). The independent variables in each model are dummy variables representing presidential appointment cohorts (coded "1" if the judge belonged to the presidential cohort and "0" if the judge did not).

67. See generally Rowland & Todd, *supra* n. 6.

68. I obtained only 103 votes in upperdog v. underdog cases and, thus, even fewer when dividing the threshold votes into proper-party and proper-forum votes. Thus, the analysis is run only for votes cast in upperdog v. upperdog and underdog v. upperdog challenges. Nixon appointee Judge Murray Gurfein of the Second Circuit is treated as a Nixon judge despite confirmation after Nixon left office, which is consistent with the convention used in the district-court study. See Rowland & Todd, *supra* n. 6, at 177.

69. See generally *id.*

70. *Id.* at 181.

appellate context and beyond the issue of standing, one should expect a negative and statistically significant coefficient on the Reagan cohort variable in cases in which underdogs encounter threshold challenges against upperdogs across the combined sample of all threshold votes and in the more limited samples of proper-party and proper-forum threshold votes. In addition, it is also possible that Reagan judges will exhibit greater flexibility when upperdogs confront procedural access questions in cases against underdogs or upperdogs and, thus, I expect a positive and statistically significant coefficient on the Reagan cohort dummy variable in the models restricted to these particular cases.⁷¹ I test as well the expectation that the other conservative judicial cohorts will follow similar tendencies as the Reagan cohort (that is, relative to the Carter appointees in the sample).

Table 4, which appears on the next page, presents the results of the appellate-judge-cohort analysis across all threshold votes. As seen in that table, there are no statistically significant differences in the threshold decisions of the Nixon and Bush I cohorts and the Carter cohort when underdogs confront threshold challenges when suing upperdogs.⁷² Reagan appointees, however, do appear distinct from those of Carter in this context. As expected, the sign on the Reagan cohort variable is negative and is significant at the .01 level. However, contrary to my expectation, these same patterns were evident in the model of upperdog-versus-upperdog votes as well. That is, Reagan appointees were also more likely than the Carter judges in this model to issue a restrictive access vote in cases that involved upperdogs confronting upperdogs.

71. There were no cases in Rowland and Todd's data in which standing was a potential bar for an upperdog opposing an underdog, *id.* at 179 n. 3, but their findings cast doubt on the proposition of a negative relationship here. In other words, earlier research suggests that the Reagan cohort would be unlikely to vote against access in a case in which an upperdog was suing an underdog.

72. The coefficients on both of the included cohort variables are negative, but they are not statistically significant.

TABLE 4		
A MODEL OF THE LIKELIHOOD OF A PRO-ACCESS VOTE (CARTER JUDGES, EXCLUDED CATEGORY)		
ALL THRESHOLD VOTES		
	UPPERDOG V. UPPERDOG	UNDERDOG V. UPPERDOG
INDEPENDENT VARIABLE	MAXIMUM-LIKELIHOOD ESTIMATION*	MAXIMUM-LIKELIHOOD ESTIMATION*
Nixon Cohort	-0.1003 (0.2002)	-0.2317 (0.1869)
Reagan Cohort	-0.2879 ⁺ (0.1650)	-0.5743*** (0.2182)
Bush I Cohort	-0.0982 (0.3373)	-0.4297 (0.2967)
Intercept	0.0148 (0.1168)	-0.2634** (0.1331)
Number of Cases	832	1041
Classified Correctly	53.13%	62.82%
Wald Chi Square	3.12, 3 df, prob > χ^2 = 0.3739	7.51, 3 df, prob > χ^2 = 0.0574
<p>* Robust standard errors clustered by judge are shown in parentheses.</p> <p>** p < .05</p> <p>*** p < .01.</p> <p>⁺ Significant at p < 0.05, but sign of coefficient is opposite to that hypothesized.</p> <p>All tests are one-tailed, with the exception of the intercept.</p>		

To what extent, however, do these findings hold up when tested separately across the subcategories of threshold issues? Table 5, which appears on the next page, presents the results of the model over two subsets of cases—those that raise proper-party threshold questions and those that raise proper-forum threshold questions. Due to the more limited samples, these analyses are confined to the threshold votes of the Nixon, Reagan, and Carter cohorts, with the Carter appointees again serving as the reference category.

As seen in Table 5 on the next page, in the more limited samples of upperdog-versus-upperdog cases, there are no statistically significant differences in the threshold voting behavior of the Nixon and Reagan cohorts and the Carter cohort across either proper-party or proper-forum votes. The coefficients of the Nixon and Reagan cohort variables are negative, but they do not reach conventional levels of statistical significance. However, as in the previous analysis, cohort effects emerge when threshold challenges appear in cases pitting underdogs against upperdogs. In the proper-party context, both the Nixon- and Reagan-cohort coefficients are negative and statistically significant. Thus, when the threshold issue raised is one of standing, ripeness, mootness, or the like, Reagan and Nixon appointees on the federal courts of appeals tend to be less likely to grant access to underdogs suing upperdogs than are Carter appointees.

Such results, however, do not extend to the proper-forum context. In fact, the coefficients of both the Nixon- and Reagan-cohort variables are positively signed and are significant in that direction in the model of underdog-versus-upperdog proper-forum votes,⁷³ suggesting the existence of pro-access voting on threshold matters by these cohorts of judges in these proper-forum cases. Further, there are no statistically significant differences between the Reagan and Nixon cohorts and the omitted category, the Carter cohort, when upperdogs sue upperdogs and encounter a proper-forum challenge.

73. The model itself, however, is significant at about 0.1.

TABLE 5
A MODEL OF THE LIKELIHOOD OF A PRO-ACCESS VOTE
(CARTER JUDGES, EXCLUDED CATEGORY)

	<i>Proper Party</i>		<i>Proper Forum</i>	
	<i>Upperdog v. Upperdog</i>	<i>Underdog v. Upperdog</i>	<i>Upperdog v. Upperdog</i>	<i>Underdog v. Upperdog</i>
INDEPENDENT VARIABLE	MAXIMUM- LIKELIHOOD ESTIMATION*	MAXIMUM- LIKELIHOOD ESTIMATION*	MAXIMUM- LIKELIHOOD ESTIMATION*	MAXIMUM- LIKELIHOOD ESTIMATION*
Nixon Cohort	-0.1586 (0.3016)	-0.5747** (0.2964)	-0.1038 (0.3260)	0.3722* (0.2087)
Reagan Cohort	-0.0989 (0.2806)	-0.8189† (0.2631)	-0.2293 (0.3195)	0.4500* (0.2520)
Intercept	-0.2469 (0.1972)	-0.0482 (0.2012)	0.3163 (0.2356)	-0.3996*** (0.1433)
Number of Cases	320	504	279	407
Classified Correctly	58.13%	62.30%	55.20%	54.05%
Wald Chi Square	0.29, 2 df, prob > χ^2 = 0.8641	9.83, 2 df, prob > χ^2 = 0.0073	0.52, 2 df, prob > χ^2 = 0.7707	4.58, 2 df, prob > χ^2 = 0.1012
<p>* Robust standard errors clustered by judge are shown in parentheses. ** p < .05 *** p < .01 † p ≤ .001 *significant at p < .05 but sign of coefficient is opposite to that hypothesized All tests are one-tailed, with the exception of the intercept.</p>				

In summary, insofar as these results suggest that the policy prerogatives of presidents who select judges for the federal

courts of appeals can potentially steer these judges' gatekeeping proclivities, they are in accordance with earlier work on gatekeeping by federal district judges.⁷⁴ Like the Reagan-appointed district judges studied earlier, Reagan appointees to the federal courts of appeals were less willing than Carter appointees to issue a pro-access threshold vote for an underdog challenging an upperdog, at least in some circumstances. Specifically, although this result emerged when all threshold issues were examined together and when the analysis was confined to proper-party issues, the Reagan judges in this sample did not appear to be less willing to provide a pro-access vote for underdogs relative to the Carter judges when the threshold vote was on a proper-forum question. In fact, the results, if anything, suggest the opposite conclusion.

When looking at the other cohorts in the analysis, the voting behavior of Nixon and Bush I judges was not statistically different from that of Carter judges in either model including all threshold votes. In the model of proper-party votes, however, Nixon judges (like Reagan judges) were more likely than Carter judges to vote against review of the merits in cases in which underdogs were challenging upperdogs. However, this behavior toward underdogs (i.e., individuals) was not apparent when the threshold issue involved a proper-forum matter.

IV. DISCUSSION

Recent studies have highlighted the "important gatekeeping role" performed by judges on the federal courts of appeals⁷⁵ when determining if a threshold doctrine should prevent review of a claim on appeal and evaluating whether the trial court appropriately applied a threshold doctrine.⁷⁶ While in some instances appellate judges will not hold that threshold rules bar them from hearing a claim, in other cases, they will. Assessing the number of cases including threshold questions in the federal courts of appeals and exploring whether threshold votes reveal any circuit-specific tendencies or reflect the partisan

74. See Rowland & Todd, *supra* n. 6, at 183.

75. Kaheny, *supra* n. 1, at 153; see also Kaheny & Rice, *supra* n. 3, at 202, 204.

76. Kaheny, *supra* n. 1, at 130–31, 153; see also Kaheny & Rice, *supra* n. 3, at 205.

preferences of the presidents appointing particular judges, therefore, is a worthwhile task. And despite developments to further examine these threshold decisions in the literature, basic descriptive studies have been lacking.

This study offers this type of analysis. Specifically, the study examines the frequency of gatekeeping decisions in the federal courts of appeals and investigates whether behavioral differences might be evident between Democratic and Republican appointees and among those appointed by select presidents of both parties. As detailed here with the use of the Original Courts of Appeals Database, the overall mean percentage of these types of decisions for each of the five time periods of the study ranged from about fourteen percent to twenty-eight percent. In addition, with the exception of the third time period of the study (1969-71), the general trend indicates that a larger percentage of cases include threshold judgments over the periods examined here.

The analysis further shows that circuits vary in their gatekeeping tendencies. For example, with the exception of the second time period in the sample, in which its pro-access percentage approached the overall mean, the Fourth Circuit had a lower pro-access percentage than the overall mean of each time period. Other circuits, like the Third and Tenth, were typically more willing—relative to the other circuits—to grant access when ruling on threshold questions. These trends across circuits might very well be suggestive of key policy differences, a finding worthy of future investigation.

In this analysis, I explored partisan sources of variation in threshold decisionmaking among the judges as well. In particular, I assessed differences between Democratic and Republican appointees' gatekeeping behavior across various types of cases and threshold votes in the federal courts of appeals. As seen in the analysis, there are some notable differences between the threshold decisions of Democratic and Republican appointees in upperdog-versus-upperdog cases as well as in underdog-versus-upperdog cases. However, while these differences were apparent when examining all threshold issues combined and in the category of proper-party cases, they were not apparent in proper-forum cases.

In addition to an examination of basic partisan differences, I also investigated whether there are presidential cohort differences in appeals-court gatekeeping. Here, as well, the lesson seems to be that judicial access tendencies are conditional upon the types of threshold questions at issue and the nature of the parties before the court. Expectations regarding Republican appointees' treatment of underdog litigants challenging upperdogs were supported in a pooled model of all threshold votes, but a more limited analysis suggests that these findings are more a function of restrictive access decisions in what are classified as proper-party concerns.

V. CONCLUSION

In summary, this study joins a few others in suggesting that scholars provide additional assessment of threshold decisions in the federal courts of appeals.⁷⁷ Many decisions in the federal courts of appeals involve threshold issues and, as seen here, there are voting trends in those cases among Republican and Democratic appointees and among those chosen by certain presidents. Future scholars should also assess the impact these votes have on the parties who come before the federal courts of appeals: Are potential appellants, for example, responsive to access trends and do they in consequence make decisions about whether to appeal as a result of access policies?⁷⁸ Further, is the Supreme Court an active monitor of threshold decisions made in the federal courts of appeals, and is circuit variation in pro-access trends a function of Supreme Court supervision (or lack thereof)? How do threshold doctrines operate, moreover, in unpublished cases?⁷⁹ Thus, more work should be done to probe threshold decisions in the federal courts

77. See *e.g.* Kaheny, *supra* n. 1, at 153; Kaheny & Rice, *supra* n. 3, at 222.

78. See Taggart & DeZee, *supra* n. 2, at 92 (noting that "substantive access issues . . . allow the Supreme Court not only to clear the path leading to the courts but also to erect barriers to issues they choose not to confront"); see also Atkins & Taggart, *supra* n. 2, at 377 (suggesting that "[i]t is possible to interpret substantive access rules as regulating the flow of cases to the federal courts").

79. See Kaheny & Rice, *supra* n. 3, at 222 (suggesting this as a possible area for future research).

of appeals and to examine the effects of those decisions in a more exhaustive manner.



